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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-832

RAYMOND MARQUEZ,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Jurisdiction	1
Questions Presented	2
Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	7
Conclusion	12
Certification	13
Appendix A—	
Opinion of Court of Appeals	A1
Appendix B—	
Judgment of Court of Appeals	A9
Appendix C—	
Opinion of the Court of Appeals Denying Petition for Rehearing or Rehearing en Banc	A11
Appendix D—	
Order of the Court of Appeals Denying Petition for Rehearing en Banc	A12

PAGE

Authorities Cited

Cases:

Bamman v. Erickson, 288 N.Y. 133, 41 N.E.2d 920 (1942) 5

People v. Farone, 308 N.Y. 305, 125 N.E.2d 582 (1955) 5
People v. Solomon, 296 N.Y. 220, 72 N.E.2d 163 (1947) 5

Rewis v. United States, 401 U.S. 808 (1971) 7, 11

Taglianetti v. United States, 394 U.S. 316 (1969) 2

United States v. DeCavalcante, 440 F.2d 1264 (3rd Cir. 1971) 7
United States v. Karigiannis, 430 F.2d 148 (7th Cir. 1970) 8
United States v. Roselli, 432 F.2d 879 (9th Cir. 1970) 5

Federal Statutes:

18 U.S.C. §2 ..... 2, 7
18 U.S.C. §371 2
18 U.S.C. §1952 ..... 2, 4, 5, 6, 7, 8, 12

State Statute:

New York Penal Code, Sec. 225.00.3 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

RAYMOND MARQUEZ,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Raymond Marquez respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 16, 1971.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 16, 1971. A petition for rehearing or rehearing en banc was filed on July 29, 1971 and denied on November 8, 1971. Counsel never received notice of the denial from the Clerk's Office of the Court of Appeals and only learned of the denial on December 20, 1971 after it appeared in an advanced sheet of the Federal

Reporter for the week of December 6, 1971. No application for an extension of time within which to file this petition was sought. Failure to file a timely petition for certiorari, especially for good cause shown, is not a jurisdictional defect barring the granting of the petition. *Taglianetti v. United States*, 394 U.S. 316, n. 1 (1969).

Questions Presented

Whether winnings from bets made with a policy operation, not gotten through fraud or cheating, are the proceeds of an unlawful activity within the meaning of 18 U.S.C. Sec. 1952 so that their transportation in interstate commerce is a violation of that section.

Whether travel by a bettor who was neither a co-defendant nor a co-conspirator is proscribed by 18 U.S.C. Sec. 1952, so that if the petitioner caused it to be done he violated that section.

Provisions Involved

18 U.S.C. Sec. 1952.

Statement of the Case

The petitioner Raymond Marquez was convicted of two violations of 18 U.S.C. Secs. 1952 & 2 and conspiracy to violate section 1952 under 18 U.S.C. Sec. 371 in the Southern District of New York after trial before the Honorable Edward Weinfeld and a jury on December 18, 1970. On February 2, 1971 the defendant was sentenced to a term of imprisonment of 3 years on each of the three counts, to be served concurrently.

The first and second counts of the indictment charged that between December 7 and December 11, 1969 Raymond Marquez and 2 co-defendants caused one Juan Nieves Monserrate to travel between New York and Puerto Rico to distribute the proceeds of an illegal activity and to facilitate an extortion in violation of New York Law. The third count of the indictment charged the 3 defendants and a fourth co-conspirator, not named as a defendant, with conspiracy to do these things.

Upon the trial the government's main witnesses were Monserrate and his father-in-law, Thomas Alvarez. For approximately a year prior to the time referred to in the indictment, Monserrate worked in an illegal numbers betting business, making collections of the envelopes containing the numbers which had been bet and bringing those envelopes to a "bank". Alvarez worked taking bets on numbers directly from the gamblers. Monserrate's pay was $75.00 per week and he testified that he sometimes spent his whole salary betting on numbers himself. He testified that during 1969 numbers which he bet won him about $4,000.00.

On December 7, 1969, a co-defendant Pedro Rivera went to Monserrate's apartment and told him that Raymond Marquez wanted to see him. On December 8, 1969, Monserrate and Alvarez, accompanied by Rivera, met with Marquez and Angelet and were informed by Marquez that both Monserrate and Alvarez had been cheating on the numbers by placing bets after 2 of the 3 digits of the winning number had already been determined. Monserrate denied cheating but told the defendants that he had money in Puerto Rico. Monserrate was told to get the money. On December 9, 1969 Monserrate flew to Puerto Rico, returning to

New York with $7,300.00 on December 10, 1969. He was met at the airport by FBI agents who told him that they knew of his encounter with the petitioner. He was then taken to FBI headquarters where the money was taken from him and marked. He returned to the FBI office the following morning where he called Rivera to arrange to give the money to Marquez. That afternoon, Monserrate was driven to the Caribe Flower Shop by FBI agents where he turned the money over to Marquez. Within a few moments FBI agents entered the Flower Shop and arrested Marquez. This short sequence of events formed the gravamen of the government's case.

Rivera testified to substantially the same facts except that he asserted that Monserrate had cheated on the numbers, that no threats, overt or implied, were made to recover the money and that Monserrate was not told by any of the defendants that he had to go to Puerto Rico to get the money.

Reasons for Granting the Writ

The first count of the indictment charged the petitioner with violating 18 U.S.C. Sec. 1952 by causing travel in interstate commerce for the purpose of distributing the proceeds of unlawful activity. Upon the trial it was the government's contention that Monserrate worked as a collector for the petitioner and also placed bets with the petitioner's numbers operation. As a result of his betting activity Monserrate won large sums of money. Monserrate denied that he cheated by placing his bets after part of the winning number was already known. The government contends that Marquez accused Monserrate of cheating

and demanded the return of the winnings and caused Monserrate to travel to Puerto Rico to retrieve the winnings which he had sent there a short time before. The government charged that this constituted both an extortion and the transportation in interstate commerce of the proceeds of an unlawful activity in violation of 18 U.S.C. §1952.

Thus, the first question presented is whether a bettor's winnings, not gotten through fraud or cheating, are the proceeds of "unlawful activity" within the meaning of Sec. 1952. The statute specifically refers to state law to define "unlawful activity":

> "Any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed . . ."

Under the law of the State of New York where the petitioner's gambling operation was located and where Monserrate placed his bets, the activity of a bettor in making wagers with an illegal gambling operation is not itself illegal activity. See New York Penal Code, Sec. 225.00.3. *People* v. *Farone*, 308 N.Y. 305, 125 N.E.2d 582 (1955); *People* v. *Solomon*, 296 N.Y. 220, 72 N.E.2d 163 (1947); *Bamman* v. *Erickson*, 288 N.Y. 133, 41 N.E.2d 920 (1942). Consequently the bettor's winnings are not the proceeds of "unlawful activity."[1]

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[1] Compare *United States* v. *Roselli*, 432 F.2d 879 (9th Cir. 1970) where the defendant's activities in cheating at card games were criminal in the state where committed, and consequently the winnings from those games were the proceeds of unlawful activities within the meaning of Sec. 1952. Here it was the government's contention that Monserrate did not engage in any fraud or trickery but that his winnings were the result of chance alone.

Faced with this argument, the government contended, and it was accepted by the Court of Appeals, that the proceeds could be traced back to the petitioner and the winnings were the proceeds of his unlawful activity. This construction violates the intent of Sec. 1952 for two reasons. First, as the legislative history set forth below clearly shows, the drafters intended the term "proceeds of unlawful gambling activity" to encompass the profits made by the owners of a gambling enterprise, not the winnings of bettors which were certainly not profits or proceeds of the petitioner. Second, probably all monies, because of their fungible nature and the rapidity of circulation, could be traced to an unlawful transaction of some kind, but there is no provision in the statute for such tracing. The statute is intended to proscribe the transportation in interstate commerce of the earnings or profits made from an illegal gambling business and not the transportation of chance winnings from lawful betting activities.

In addition, the statute defines "unlawful activity" as any "business enterprise" . . . The government has never contended, as indeed it could not, that Monserrate's occasional betting activities amounted to a "business enterprise" within the meaning of the statute.

For all of these reasons Monserrate's carrying of his winnings from Puerto Rico to New York was not the transportation of the proceeds of unlawful activity within the meaning of Sec. 1952 and the conviction herein must be vacated and a new trial ordered.

The second question presented by this petition is whether the travel in interstate commerce of a bettor or the victim of an extortion may be the basis for federal jurisdiction under Sec. 1952.

In this case the government never contended that the petitioner travelled or used interstate facilities to sustain the charge under Sec. 1952. Rather the government's theory was that the petition caused Monserrate to travel in interstate commerce. The question whether the travel of a non-defendant who was not a co-conspirator may be used as a basis for federal jurisdiction is a relatively novel one.

Recently, in *United States* v. *DeCavalcante*, 440 F.2d 1264 (3rd Cir. 1971) (March 10, 1971), the Third Circuit said that travel by the victim of an extortion could serve as a basis for federal jurisdiction under Sec. 1952. However, this portion of the opinion was not the basis for the Court's decision. More important, the opinion in *DeCavalcante* was announced before the opinion in *Rewis* v. *United States*, 401 U.S. 808 (1971), and in light of *Rewis* the dictum in *DeCavalcante* should not be followed.

In *Rewis*, the defendants managed a gambling business in Florida which was patronized by out-of-state bettors. The defendants and some of their customers were convicted for violations of Sec. 1952. The Court of Appeals overturned the convictions of the bettors, reasoning that their travel was not the kind proscribed by the statute. This Court agreed and unanimously reversed the remaining convictions of the owners of the gambling operations who had been charged as aiders and abettors of the gamblers under Sec. 2 and who engaged in no interstate travel themselves:

> "We agree with the Court of Appeals that it cannot be said, with certainty sufficient to justify a criminal conviction that Congress intended that interstate travel by mere customers of a gambling establishment should violate the Travel Act. But we are also unable to con-

> clude that conducting a gambling operation frequented by out-of-state bettors, by itself, violates the Act . . . In short, neither statutory language nor legislative history supports such a broad ranging interpretation of Sec. 1952. And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. *Bell* v. *United States*, 394 U.S. 81, 83 (1955)."

It is submitted that the reasoning of this Court in *Rewis* applies with equal force to this case and requires that the indictment be dismissed for the reason that Monserrate's travel was not the kind of travel proscribed by the statute.[2]

The legislative history behind Sec. 1952 is scant, consisting almost entirely of a speech given by the then Attorney General Robert F. Kennedy in hearings before both the House and Senate Judiciary Committees, but it indicates that the type of travel at issue here was never intended to be proscribed by the statute. In his speech the Attorney General gave numerous examples of the situations the act was designed to encompass. None of them resembles the conduct the government seeks to proscribe here. Further, it is clear from the Attorney General's remarks that "proceeds of unlawful activity" was intended to refer to the profits made on a gambling business by its proprietor and not the winnings of a bettor:

> "The examples I am going to give have a factual basis, but I will speak mainly in generalities in open session for obvious reasons.

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[2] See also, *U.S.* v. *Karigiannis*, 430 F.2d 148 (7th Cir. 1970) where interstate travel by the victim of an extortion was not used as a basis for federal jurisdiction under Sec. 1952.

Our first example is as follows: Some notorious individuals, whose names you would immediately recognize, had interests in a numbers bank but lived in a resort town far from the scene of operation. Every month a messenger carried the profits of the numbers racket from the scene of operations to the resort town. One of the payments was in excess of $250,000. Thus, the persons reaping the profit from the illegal activity remained beyond the reach of the law enforcement officials at the place of operation and committed no crime in the State where they lived. Only the Federal Government can curtail the flow of funds which permit the kingpin to live far from the scene, preventing the local officials, burdened by the gambling activity, from punishing him.

If your bill is enacted we will be able to prosecute the courier who carries the funds across State lines and in conjunction with the aiding and abetting statute (18 U.S.C. 2) we will be able to prosecute the person who caused the courier to travel—the kingpin. This example illustrates what we have found to be a pattern around the country where the apparently innocuous 10-cent numbers bet in a large city turns into tremendous profits in the hands of big-time hoodlums.

Another example involves the frequent travel from a Middle Atlantic State to a New England State by the operator of a lottery—and/or members of his family—to make payments to winners or pick up money wagered. Our information reveals that, in order to avoid the statute proscribing interstate transportation of lottery tickets (18 U.S.C. 1301), the individual carried the plates for printing the tickets to the

various States. He did that so the tickets could be printed locally.

In another instance in a Midwestern State, the scene of illicit operations is close to the border of the State. One individual travels daily between two States. He conducts his layoff business in the one State and lives in a $200,000 house in the suburbs of a large city across the border in the other State.

Let me cite another example. The layoff men at the top of the bookmaking organization are in daily contact with each other to reinsure their bets and divide the action, thus assuring that all make a profit and no one takes an exorbitant risk.

These people can conduct their business by telephone. When local authorities get close to them, they merely pick up stakes and move to another jurisdiction. The best example of this moving to frustrate local police, is the case of a man who started operations as a layoff man in the Midwest in 1946. He moved to another town in 1949 and then to Newport, Ky., in 1950. In 1952, under pressure of the Kefauver investigations into organized crime, he moved to Montreal, Canada. When the Royal Canadian Mounted Police raided his establishment he moved back to Newport, Ky. We can follow these people from State to State and prosecute for the very activities which now make a mockery of local law enforcement if this travel bill is enacted.

The layoff men, who comprise the gambling syndicate, must settle their accounts periodically for they do not trust each other any more than they trust the average bettor. They settle the accounts by having a "bagman" travel throughout the country picking up and deposit-

ing funds to balance the books. He receives reports of balances due from each of the layoff men. He acts as a clearing house and accountant for the group—settling the accounts in accordance with good accounting practice in much the same manner that our banking clearing houses operate. The only difference is that the banking houses are not afraid of divulging their income through the use of banking channels. The gamblers use cash and a messenger to clear the daily balances.

When a Braniff airplane crashed at Buffalo, Tex., on September 30, 1959, a collection man for a prime subject of the Kefauver investigation, was killed. The collection man was en route to New York with his boss' share of profits from gambling operations in Texas. With the enactment of this bill, prosecution may be undertaken in future situations against men like this and the persons who send them to collect the proceeds.

In summary, our information reveals numerous instances where the prime mover in a gambling or other illegal enterprise operates by remote control from the safety of another State—sometimes half a continent away. He sends henchmen to the scene of operations or travels himself from time to time to supervise the activity and check on his underlings. As for the profits, he receives his share by messenger."

It is clear from these examples and the legislative history cited in *Rewis* that the conduct here was never intended to be proscribed.

Travel by a bettor or the victim of an extortion was never intended to serve as the predicate for federal jurisdiction

under Sec. 1952. The conduct charged in this case could have been prosecuted under state law. Federal Courts should always hesitate before encroaching on the jurisdiction of state criminal laws, particularly where as here the Federal Statute was intended to search conduct beyond the purview of one state's laws. No such situation existed in the case. The exercise of federal jurisdiction in this case was unnecessary and improper since the travel of a mere bettor was never intended to serve as a basis for federal jurisdiction.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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December 23, 1971

Certification

I hereby certify that on this 23rd day of December, 1971 three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 968, 969, 970—September Term, 1970.

(Argued June 2, 1971 Decided July 16, 1971.)

Docket Nos. 71-1223, 71-1246, 71-1250

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAYMOND MARQUEZ, a/k/a "Spanish Raymond," ANTHONY ANGELET and PEDRO RIVERA, a/k/a "Pete Russo,"

Appellants.

Before:

CLARK, *Associate Justice,** SMITH, *Circuit Judge,* and ZAVATT, *District Judge.***

Appeal from convictions on charges of interstate and foreign travel in aid of racketeering enterprises and conspiracy to do so, 18 U.S.C. §§1952 and 371; in the United

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* Retired Associate Justice of the Supreme Court, sitting by designation.

** Senior District Judge for the Eastern District of New York, sitting by designation.

Appendix A—Opinion of the United States Court of Appeals

States District Court for the Southern District of New York, Edward Weinfeld, *Judge*. Affirmed.

NANCY ROSNER, New York, N. Y. (Edmund Allen Rosner, New York, N. Y., of counsel), *for Appellant Marquez.*

JOSEPH I. STONE, New York, N. Y. (Selig Lenefsky, New York, N. Y., of counsel), *for Appellant Angelet.*

HENRY B. ROTHBLATT, New York, N. Y. (Monte Engler, New York, N. Y., of counsel), *for Appellant Rivera.*

THOMAS J. FITZPATRICK, Asst. U. S. Attorney (Whitney North Seymour, Jr., U. S. Attorney for the Southern District of New York, Allan A. Tuttle, Asst. U. S. Attorney, of counsel), *for Appellee.*

SMITH, *Circuit Judge*:

This is an appeal from the United States District Court for the Southern District of New York (Edward Weinfeld, *Judge*) from a judgment of conviction entered against Raymond Marquez, Anthony Angelet, and Pedro Rivera for violations of 18 U.S.C. §1952 and 18 U.S.C. §371.[1]

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[1] 18 U.S.C. § 1952:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

Appellants Marquez and Angelet were sentenced to concurrent terms of three years imprisonment on each count, and Rivera to eighteen months.

The government's basic contention is that Marquez, who controlled a numbers operation in Harlem, forced one of his messengers, Juan Nieves Monserrat (hereinafter "Nieves"), to travel to Puerto Rico to secure funds to be paid to appellants pursuant to an extortion conspiracy. Marquez was alleged to have accomplished this by means of threats against Nieves and his father-in-law Tomas Alvarez.

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(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

18 U.S.C. §371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

On December 7, 1969 Rivera, who was also an employee of Marquez in the policy operation, informed Nieves that he had been accused of cheating on the numbers operation and that Marquez wanted to see him about it. The following day Rivera drove Nieves and his father-in-law to the Caribe Florist Shop which served as the "bank" for the policy operation. There Marquez took Nieves into a back room where the appellant Angelet was waiting and accused Nieves of cheating the operation by betting for himself after part of the daily winning number had already been determined.[2] The two men demanded that Nieves pay them $14,000. Nieves informed them that all the money he had (about $7,300) was in Puerto Rico. He was instructed to go there and get it. During this meeting physical threats were made by Angelet against both Nieves and his father-in-law. Sometime after the conversation began Rivera entered the room. There is conflicting testimony as to whether he came in before or after the threats were made by Angelet.

The next day Rivera went to the Alvarez home and collected $1,000. He also collected $700-800 from Nieves. Later that same day Nieves flew to Puerto Rico and retrieved $7,435.00, returning to New York on the following day.

When Nieves stepped off the plane at Kennedy Airport he was met by agents of the F.B.I. who told him that they knew of his problems with Marquez. Nieves agreed to cooperate with the agents and after detailing the entire

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[2] The winning number was determined by the total amount bet at a particular race track on that particular day.

story was allowed to return home. On the following day he returned to the F.B.I. headquarters and called Rivera to report that he had the money. Rivera instructed him to bring it to the flower shop where "Raymond" would be waiting. Nieves took the money to the shop and gave it to Marquez. The F.B.I. then entered the shop and arrested Marquez. Rivera and Angelet were later taken into custody.

The appellants raise a number of different allegations of error, none of which have any merit. Marquez contends that the money which Nieves obtained in Puerto Rico did not constitute the "proceeds of an unlawful activity" as required by the statute. This argument was not raised below, and the appellant is thus precluded from arguing it for the first time here. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). In any case, the government contends quite correctly that the question is not whether Nieves in acting as a messenger for the numbers operation had himself obtained the money illegally, but rather that he was ordered to Puerto Rico to obtain the proceeds of what was clearly an illegal operation carried on by the appellants.

Marquez next alleges that the trial court erred by not charging the jury that it must find that the defendants had committed acts in furtherance of the conspiracy following Nieves' return from Puerto Rico. Judge Weinfeld, however, in discussing the third element of the offense specifically charged that the jury must find that "at a time subsequent to such interstate or foreign travel, the defendant performed or attempted to perform one or more acts to

promote, carry on, or facilitate the promotion or carrying on of the unlawful activity of extortion." The portion of the charge to which the appellant takes exception related to the intent element of the offense which, of course, required only that the government show that at some time during the conspiracy the defendants had an intent to cause interstate travel for purposes of extortion.

The appellants next argue that the travel to Puerto Rico, since it was not undertaken either by a defendant or a co-conspirator, did not come within the terms of the statute. The appellants principally rely on the Supreme Court's recent decision in *Rewis* v. *United States*, 39 U.S.L.W. 4363, 4365 (April 5, 1971), where the Court held that section 1952 was not intended to apply in a case where the owners of a Florida gambling operation were convicted on the theory that they had caused the unlawful interstate travel of their patrons. The Court went on to note, however, that "[t]here are cases in which the federal courts have correctly applied §1952 to those individuals whose agents or employees cross state lines in furtheranee of illegal activity. *United States* v. *Chambers*, 382 F.2d 910, 913-914 (6 Cir. 1967); *United States* v. *Barrow*, 363 F.2d 62, 64-65 (3 Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *United States* v. *Zizzo*, 338 F.2d 577, 580 (7 Cir. 1964), *cert. denied*, 381 U.S. 915 (1965)." The Third Circuit has recently specifically held that section 1952 is properly invoked where the only interstate travel is by the victim of an extortion scheme. *United States* v. *DeCavalcante*, —— F.2d —— (3 Cir. 1971) (Slip Op. filed March 10, 1971).

Angelet and Rivera contend that there is insufficient evidence of their participation in the conspiracy. Rivera

clearly participated in the events of the conspiracy from beginning to end. He initially informed Nieves that he was accused of cheating. He accompanied Nieves to the meeting with Marquez. He participated in at least part of the conversation in which Nieves and Alvarez were threatened. He instructed Nieves to bring the money to the flower shop after he returned from Puerto Rico. There was, therefore, more than sufficient evidence to link Rivera to the conspiracy.

Angelet's participation is equally well established. He participated in the meeting with Marquez, Nieves and Alvarez. He used obscene and threatening language with Nieves, and he threatened Alvarez with physical injury. In addition, he appeared at the flower shop when Nieves delivered the money.

Marquez next alleges that it was error to permit some members of the jury to take notes during the trial and later use them in the course of their deliberations without any special instructions as to their use or without permiting defense counsel to inspect them. It has been well established in this circuit that it is within the trial court's discretion to allow the jury to take notes. The appellant has suggested no reason why this should be reconsidered. *United States* v. *Chiarella*, 184 F.2d 903, 907 (2d Cir. 1950).

Finally Rivera argues that his trial should have been severed from that of his co-defendants in order that he might comment on their refusal or failure to testify. Rivera bases this contention on dictum found in the Fifth Circuit's opinion in *DeLuna* v. *United States*, 308 F.2d 140 (1962), where the court noted:

> If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendant be tried separately. 308 F.2d at 141.

Judge Weinfeld filed a typically exhaustive memorandum opinion on this question and based his holding on alternative grounds. He first found that Rivera had put forward no argument which showed that his defense was in any way inconsistent with or antagonistic to that of his co-defendants.[3] He went on to find that in any event *DeLuna's* dicta should not be followed. He noted that it had not found favor with those courts which have considered it and it had been specifically rejected by at least one court of appeals. *United States* v. *McKinney*, 379 F.2d 259, 265 (6 Cir. 1967). He concluded that if no adverse inference could be drawn against a defendant or a witness who exercised his Fifth Amendment privilege, by the same token no "inference of innocence can be drawn in favor of a defendant who does testify because of a witness' or co-defendant's refusal to testify."

We are of the view that Rivera has failed to show sufficient inconsistency in his defense to justify a severance and therefore do not find it necessary now to consider the question raised by *DeLuna*.

The judgment of the district court is affirmed.

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[3] See, *United States* v. *Caci*, 401 F.2d 664, 672 (2d Cir. 1968), *cert. denied as to defendants Caci and Cino*, 394 U.S. 917, *rev'd on other grounds as to defendants Natarelli and Bandacci*, 394 U.S. 310 (1969).

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of July one thousand nine hundred and seventy-one.

Present:

HON. TOM C. CLARK,
Associate Justice

HON. J. JOSEPH SMITH,
Circuit Judge

HON. JOSEPH C. ZAVATT,
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

RAYMOND MARQUEZ, a/k/a "Spanish Raymond" and ANTHONY ANGELET and PEDRO RIVERA a/k/a "Pete Russo",

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

[SEAL]

A true copy,
A. DANIEL FUSARO
Clerk

A. DANIEL FUSARO
Clerk

APPENDIX C

Opinion of the Court of Appeals Denying Petition for Rehearing or Rehearing en Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

71-1223, 71-1246 & 71-1250

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

RAYMOND MARQUEZ, a/k/a "SPANISH RAYMOND" and ANTHONY ANGELET and PEDRO RIVERA, a/k/a "PETE RUSSO,"

Defendants-Appellants.

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed by counsel for the appellant Raymond Marquez and no active judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
Chief Judge

November 8, 1971

APPENDIX D

Order of the Court of Appeals Denying Petition for Rehearing en Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

71-1223, 71-1246 & 71-1250

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

RAYMOND MARQUEZ, a/k/a "SPANISH RAYMOND" and ANTHONY ANGELET and PEDRO RIVERA, a/k/a "PETE RUSSO,"

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant Raymond Marquez,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

It is further ordered that the mandate may be stayed under the conditions of Rule 41(b), F.R.A.P. pending application for certiorari.

TOM C. CLARK, *Associate Justice*
J. JOSEPH SMITH, *U. S. Circuit Judge*
JOSEPH C. ZAVATT, *U. S. District Judge*